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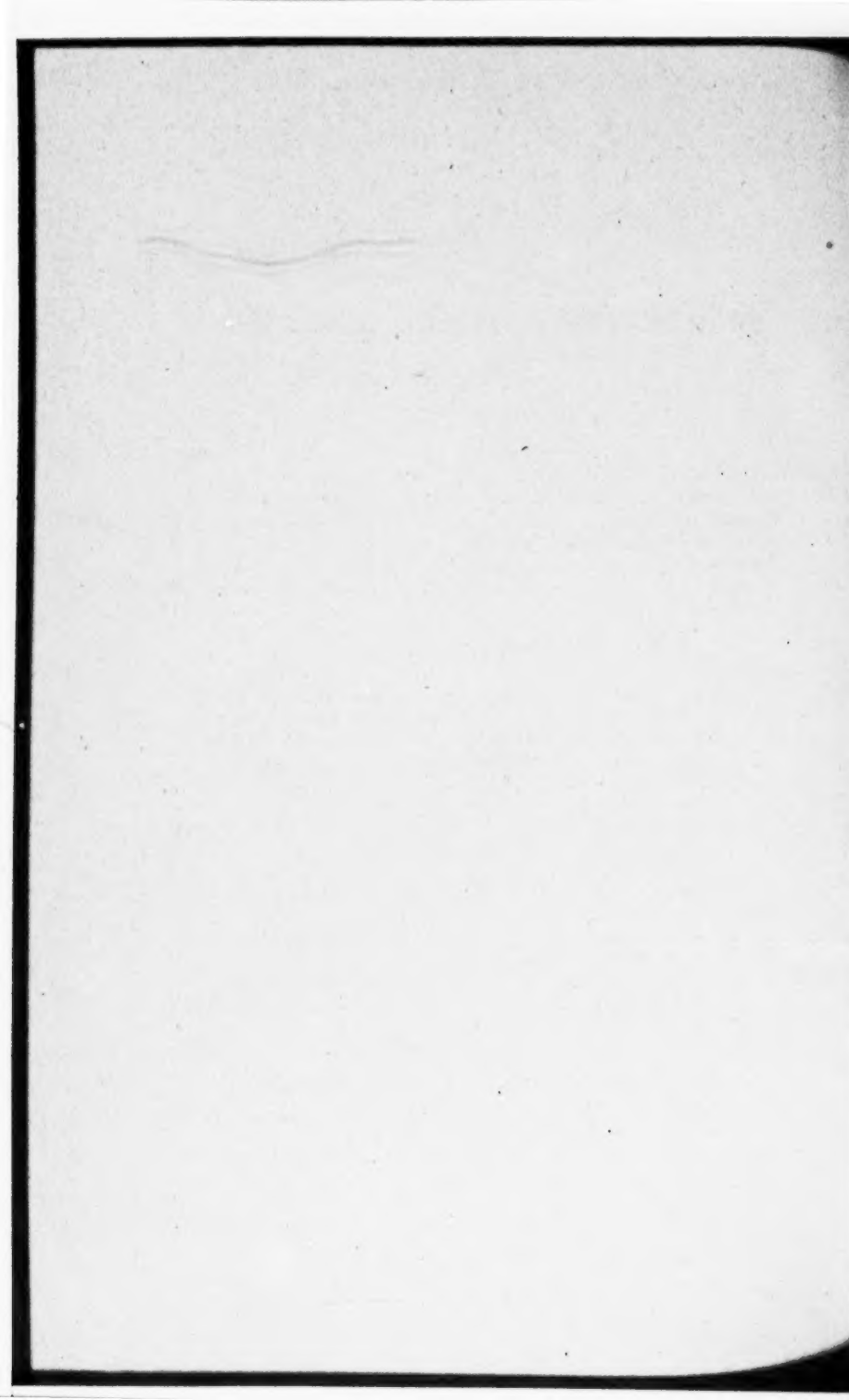
Statute:

Act of June 28, 1940, c. 440, 54 Stat. 676, as amended by the Act of May 31, 1941, c. 157, 55 Stat. 236, and by Title III of the Second War Powers Act of March 27, 1942, c. 199, 56 Stat. 177, 50 U. S. C. App., Supp. V, 633 (50 U. S. C. App., Supp. V, 1152):

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1248

R. L. BRADFORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 9-10) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered March 18, 1947 (R. 11). The petition for a writ of certiorari was filed April 15, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTION PRESENTED

Whether a regulation of the War Production Board proscribing the obtaining of materials by extending preference ratings to quantities in excess of those required to satisfy the orders in respect of which the ratings were issued, could be violated with impunity by reason of the fact, asserted on appeal from a conviction on a plea of *nolo contendere*, but for which there is no support in the record, that the materials in question could have been obtained without the use of preference ratings.

STATUTE AND REGULATION INVOLVED

The Act of June 28, 1940, c. 440, 54 Stat. 676, as amended by the Act of May 31, 1941, c. 157, 55 Stat. 236, and by Title III of the Second War Powers Act of March 27, 1942, c. 199, 56 Stat. 177, 50 U. S. C. App., Supp. V, 633 (50 U. S. C. App., Supp. V, 1152), provides in pertinent part:

SEC. 2. (a) (1) Whenever deemed by the President of the United States to be in the best interests of the national defense during the national emergency declared by the President on September 8, 1939, to exist, the Secretary of the Navy is hereby authorized to negotiate contracts for the acquisition, construction, repair, or alteration of complete naval vessels or aircraft, or any portion thereof * * *. Deliveries of material under all orders placed pursuant to the authority of this paragraph

and all other naval contracts or orders and deliveries of material under all Army contracts or orders shall, in the discretion of the President, take priority over all deliveries for private account or for export * * *.

SEC. 2 (a) (2) Deliveries of material to which priority may be assigned pursuant to paragraph (1) shall include, in addition to deliveries of material under contracts or orders of the Army or Navy, deliveries of material under—

* * * * *

(B) Contracts or orders which the President shall deem necessary or appropriate to promote the defense of the United States;

(C) Subcontracts or suborders which the President shall deem necessary or appropriate to the fulfillment of any contract or order as specified in this subsection (a).

Deliveries under any contract or order specified in this subsection (a) may be assigned priority over deliveries under any other contract or order; and the President may require acceptance of and performance under such contracts or orders in preference to other contracts or orders for the purpose of assuring such priority. Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such

manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

* * * * *

SEC. 2 (a) (5). Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than \$10,000 or imprisoned for not more than one year, or both.

* * * * *

SEC. 2 (a) (7). No person shall be held liable for damages or penalties for any default under any contract or order which shall result directly or indirectly from compliance with this subsection (a) or any rule, regulation, or order issued thereunder, notwithstanding that any such rule, regulation, or order shall thereafter be declared by judicial or other competent authority to be invalid.

SEC. 2 (a) (8). The President may exercise any power, authority, or discretion conferred on him by this subsection (a), through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe.

Priorities Regulation No. 3, as amended October 3, 1942 (7 F. R. 7887),¹ provided in pertinent part as follows:

(a) *Definitions*.—For the purposes of this regulation:

* * * * *

(2) "Material" means any commodity, equipment, accessory, part, assembly or product of any kind.

(3) "Assignment" of a preference rating means the granting to any person, by order or certificate issued by or under the authority of the Director General for Operations, of the right to use such rating.

(4) "Application" of a preference rating means the use of the rating by the person to whom it is initially assigned by or under the authority of the Director General for Operations * * *.

(5) "Extension" of a preference rating means the use of the rating by any person to whom it is applied or extended by another person.

(b) *General provisions*.—(1) * * * any person may apply a preference rating assigned to him by any preference rating

¹ This was the last amendment prior to October 19, 1942, the date of the offenses alleged in counts 1 and 2 of the information involved herein. The regulation was thereafter amended numerous times, but without pertinent substantive changes. See 8 F. R. 8995, 8 F. R. 15684, and 8 F. R. 16970, for the wording of the regulation as of July 16, 1943, December 17, 1943, and January 14, 1944, the dates of the offenses alleged in counts 5, 3, and 4, respectively.

certificate or preference rating order issued to him in his name or as one of a class, and any person may extend any rating which has been applied or extended to deliveries to be made by him, subject to the provisions of this regulation.

(2) Preference ratings may be applied by the person to whom they are assigned only to the specific quantities and kinds of material authorized, or to the minimum required amounts [of] material when no specific quantities are authorized. Ratings which have been applied or extended by others to deliveries to be made by a person may, subject to the provisions of this Regulation, be extended by such person in order to obtain not more than the same amount and kind of material (except as specified in paragraph (c) (2) of this regulation) which he has delivered or is required to deliver pursuant to such ratings.

(3) No person shall duplicate, in whole or in part, purchase orders which he has placed with one or more suppliers for delivery of material to which he has applied or extended a rating, in such manner that the amount of the material ordered exceeds the amount to which he is authorized to apply or extend the rating, even though he intends to cancel or reduce his purchase orders to the authorized amount prior to completion of delivery.

(c) *Extension of ratings.*—The following provisions shall be applicable to all exten-

sions of preference ratings notwithstanding any inconsistent provisions of the preference rating certificate or preference rating order assigning the rating. No preference ratings may be extended to the delivery of any material *except*:

(1) Material which will itself be delivered by the person extending the rating on a delivery bearing the rating which is being extended, or which will be physically incorporated into material to be so delivered, including the portion of such material normally consumed or converted into scrap or byproducts in the course of processing, or

(2) Material which is required to replace in inventory material so delivered or incorporated. * * * or

(3) Repair, maintenance and operating supplies, * * *.

* * * * *

A person may not extend a rating to any materials in excess of the quantities specified in this paragraph (c) * * *.

STATEMENT

On April 10, 1945 (R. 1), an information in five counts (R. 2-7) was filed in the District Court for the District of Connecticut charging petitioner and the Echlin Manufacturing Company, of which he was secretary-treasurer, with having unlawfully obtained designated quantities of specified

types of electrical equipment by extending² preference ratings, the quantities thus obtained being in excess of those necessary to satisfy the orders for which the preference ratings were issued, in violation of the Act of June 28, 1940, as amended, and Priorities Regulation No. 3, as amended (*supra*). Petitioner was convicted on a plea of *nolo contendere* and fined \$100 on each count (R. 1, 8).³ On appeal to the Circuit Court of Appeals for the Second Circuit on the ground that the information failed to charge an offense or, in the alternative, that Priorities Regulation No. 3 was unconstitutional as applied (see R. 9, 10), the judgment of conviction was affirmed (R. 11).

ARGUMENT

Petitioner's contention seems to be that he could have obtained the electrical equipment described in the information without the necessity of extending preference ratings and that therefore he could not have violated any law in obtaining the equipment in that manner, or, at least, that any law forbidding the acquisition of the equipment in that manner must be deemed unconstitutional as applied to him (Pet. 5, 6-7). His assertion that he could have obtained the equipment in question

² See p. 5, *supra*, for the definition of "extension" of a preference rating.

³ The record does not disclose what further proceedings were had in respect of the corporate defendant.

without the use of preference ratings is, however, not only gratuitous, but, we submit, irrelevant.

By his plea of *nolo contendere*, petitioner of course admitted the fact, as alleged, that he did obtain the equipment involved by extending preference ratings to quantities in excess of those required to satisfy the orders in respect of which the ratings were initially issued. This manner of acquisition was specifically proscribed by paragraphs (b) (2) and (c) of Priorities Regulation No. 3 (*supra*, pp. 6-7). The reason for the illegality of this manner of acquisition is obvious. By Section 2 (a) (2) of the Act of June 28, 1940, as amended (*supra*, pp. 3-4), Congress empowered the President, through such agency as he might direct, to assign priorities to deliveries of material under contracts or orders deemed by him necessary or appropriate to promote the national defense. The President was further empowered to "require acceptance of and performance under such contracts or orders in preference to other contracts or orders for the purpose of assuring such priority." The War Production Board, to which the President delegated the authority thus conferred, directed that "Defense Orders and all other orders bearing preference ratings must be accepted and filled in preference to any other contracts or orders" except those "bearing higher or equal preference ratings." Priorities Regulation No. 1 (6 F. R. 4489), as amended (8 F. R. 6417), § 944.2. Further, by Section 2 (a) (7) of

the Act of June 28, 1940, as amended (*supra*, p. 4), Congress provided that no person should be held liable for damages or penalties for any default under any contract or order resulting directly or indirectly from compliance with Section 2 (a) or any regulation issued thereunder. It is thus apparent that Congress not only exempted all suppliers of goods from liability for breach of contract resulting from their compliance with the priorities system, but also made it unlawful for suppliers to refuse to honor orders bearing preference ratings assigned under that system. From this arose the obvious necessity of proscribing the obtaining of materials by the unauthorized use of preference ratings. The power of Congress to enable the President, through the agency designated to administer the priorities system, to proscribe such unauthorized use of preference ratings is, we submit, as manifest as its power to establish the system itself.

Assuming, for argument only, the truth of petitioner's assertion, for which there is no support in the record, that on the dates alleged in the information the types of electrical equipment described therein were in such abundant supply that they could have been freely purchased by any willing buyer without the necessity of using preference ratings, his proper course, obviously, was to purchase them in that manner, and not, as he did, to acquire them by illegally extending his ratings.

CONCLUSION

The petition for a writ of certiorari presents no question meriting further review by this Court. We therefore respectfully submit that it should be denied.

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MAY 1947.